81-82

No.

Office-Supreme Court, U.S.
FILED
JUL 14 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

HORACIO RAMOS MIRANDA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Immigration and Naturalization Service may be equitably estopped from denying immediate relative status to an alien who is statutorily ineligible for such status, on the ground that the Service did not act upon the visa petition filed by the alien's former wife in the 18-month period between the time that the petition was filed and withdrawn.

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HORACIO RAMOS MIRANDA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Immigration and Naturalization Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-2a) is reported at 638 F.2d 83. The opinions of the Board of Immigration Appeals (App. C, *infra*, 4a-8a) and the Immigration Court (App. D, *infra*, 9a-11a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1980, and a petition for rehearing was denied on March 24, 1981 (App. B, *infra*, 3a). On June 12, 1981, Justice Rehnquist extended the time in which to file a petition for a writ of certiorari to and including July 15, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 106(a)(4) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a)(4), provides in pertinent part:

> [T]he petition [for judicial review of orders of deportation] shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive * * *.

Section 245(a) of the Immigration and Nationality Act, 8 U.S.C. 1255(a), provides in pertinent part:

> The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

8 C.F.R. 245.1(d) provides in pertinent part:

> An applicant who claims immediate relative status under section 201(b) * * * of the Act is not eligible for the benefits of section 245 of the Act unless he/she is the beneficiary of a valid unexpired visa petition filed in accordance with Part 204 of this chapter and approved to accord him/her such status.

8 C.F.R. 245.2(a)(2) provides in pertinent part:

> Before an application for adjustment of status under section 245 of the Act may be considered properly filed, a visa must be immediately available. If a visa would be immediately available only upon approval of a visa petition, the application will not be considered properly filed unless such petition has first been approved. If a visa petition is submitted simultaneously with the adjustment application, the adjustment application shall be retained for processing only if approval of the petition when reached for adjudication would make a visa immediately available at the time of filing of the adjustment application.

STATEMENT

1. Respondent Horacio Ramos Miranda, a 47 year old citizen of the Philippines, entered the United States on July 23, 1971, as a visitor for pleasure with authority to remain until December 1, 1971 (App. D, *infra*, 9a-10a). On May 27, 1976, Linda Milligan, a citizen of the United States, signed a visa petition in which she named respondent as an alien beneficiary and requested that he be granted an immigrant visa as her spouse, pursuant to their mar-

riage of May 26, 1976 (R. 76, 76-A).[1] See 8 U.S.C. 1151(a) and (b). The visa petition signed by Milligan, which (if approved) would qualify respondent as a person to whom "an immigrant visa is immediately available * * *" (8 U.S.C. 1255(a)(3)), together with respondent's separate application for adjustment of status to that of permanent resident alien, were filed with the Immigration and Naturalization Service on June 10, 1976 (R. 66, 66-B, 76). Respondent stated in his application for adjustment of status that he had been employed continuously in the United States since October 1971 and that he previously had been married to Josefina Lazatin from September 1971 to April 1972 (R. 70-72).

2. On December 5, 1977, prior to the Service's adjudication of the visa petition, Milligan withdrew the petition and explicitly "waive[d] any right to any appeal" (R. 75). Shortly thereafter, the Service's District Director denied respondent's application for adjustment of status on the ground of statutory ineligibility because no immigrant visa was "immediately available" to him. The District Director noted that respondent's application was no longer supported by the visa petition that Milligan had filed on his behalf, that there was nothing in the record to suggest that respondent was entitled to any other immigrant classification, and that respondent had "not established that an immigrant visa [was] immediately available" to him (R. 78). Respondent did not seek review of this order.

3. The Service subsequently issued an order to show cause why respondent should not be deported

[1] "R." refers to the certified administrative record in the court of appeals, a copy of which has been lodged with the Clerk of the Court.

as an "overstayed" visitor. See 8 U.S.C. 1251(a)(2). At deportation hearings conducted in March 1978 (R. 20-38), respondent conceded deportability but renewed his application for permanent resident status, relying solely on his prior marriage to Milligan (R. 27-31). In support of his application, respondent presented no evidence except for two documents, Milligan's petition for dissolution of the marriage and a court order requiring respondent to pay spousal support,[2] both of which he offered to show the bona fides of his former marriage (R. 29-31, 50-53). Although the immigration judge questioned the relevance of the bona fides of respondent's former marriage, respondent simply stated, "[t]hat is my offer of proof. I submit that it is relevant" (R. 31).

The immigration judge ruled that respondent's argument and offer of proof were irrelevant inasmuch as no approved visa petition was pending and no "continuing relationship [was] contemplated by either party" to the marriage (R. 30-31). In a written opinion, the immigration judge subsequently denied respondent's renewed application for adjustment of status on the ground that he was no longer eligible for such relief under Section 245 of the Immigration and Nationality Act, 8 U.S.C. 1255, and 8 C.F.R. 245.1(d), due to Milligan's withdrawal of the visa petition that she previously had filed on his behalf (App. D, *infra*, 10a). The immigration judge also denied respondent's request for voluntary departure "as a matter of administrative discretion" (*id.* at 11a).[3]

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[2] Respondent was required to pay $300 each month for the first three months, $200 each month for the following three months, and $1 each month thereafter (R. 52-53).

[3] In support of his request for voluntary departure, respondent submitted evidence showing that he had been ar-

4. On appeal to the Board of Immigration Appeals, respondent argued for the first time (see R. 12) that the Service should be equitably estopped from denying his renewed application for adjustment of status because of its "unreasonable delay" in acting on his original application during the 18 months preceding the breakup of his marriage to Milligan (R. 42-45). In respondent's view, "18 months was more than a reasonable time for the government to have acted on the petition and the application for permanent residence" (R. 42). Without citing any authority, respondent also asked that the Board take administrative notice of the Service's alleged "policy" of scheduling similar cases "for combined hearing and adjudication in less than three months" (*ibid.*). Respondent stated (R. 44):

> The visa petition and the 245 application should have been approved in that 18 months

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rested in April 1977 (R. 62-64) and that he had pleaded guilty on June 23, 1977, to one count of defrauding the Pacific Telephone Company, in violation of § 502.7(b)(1) of the California Penal Code (West 1970) (App. D, *infra*, 10a). Sentence was suspended, and respondent was placed on summary probation for one year on the condition that he violate no law and make restitution in the amount of $3,547.72 (R. 62-64). On March 31, 1978, after respondent had made full restitution, he was permitted to withdraw his plea, and the conviction was set aside under § 1203 of the California Penal Code (West 1970) (App. C, *infra*, 5a-6a; App. D, *infra*, 10a).

The immigration judge denied voluntary departure "based upon the balancing of factors, both favorable and unfavorable. There is no indication that the respondent has close family ties in the United States. His marriage to a United States citizen is at an end. The recency of his conviction for a crime involving moral turpitude is a sufficient adverse factor without counterbalancing favorable factors for me to deny his application as a matter of administrative discretion" (App. D, *infra*, 11a).

> period of time and a failure to act was not only unreasonable, unfair and unjust but also an abuse of governmental process if the delay was deliberate. The question can only be asked as to why there was such a long delay on the part of the government to take any action on the pending petition and 245 application.

The Service challenged respondent's estoppel argument on several grounds. First, the Service noted (R. 11) that the delay was due not to the time required for processing respondent's adjustment of status application, but to the time required for investigating the immediate relative visa petition filed by Milligan, upon which the adjustment application rested. Inasmuch as respondent was merely the beneficiary of the visa petition, therefore, the Service asserted that he had no statutory right to contest this alleged delay.

Second, the Service contended (R. 11), as a jurisdictional matter, that the administrative decision of a District Director with respect to a visa petition is not reviewable by an immigration judge or the Board of Immigration Appeals in a deportation proceeding. Although the citizen who has filed the petition may appeal an adverse decision to the Board of Immigration Appeals (see 8 C.F.R. 3.1(b)(5)), the only recourse available to an aggrieved alien beneficiary is in the district court (R. 11-13). In this case, however, respondent did not complain of undue delay at the time of the District Director's action, and he did not seek review of either the District Director's denial of Milligan's visa petition or the denial of his original application for adjustment of status (see R. 12). Moreover, even at the hearing on his renewed adjustment application, respondent did not complain of any delay. Thus, he neither elicited nor proffered

any evidence to show that there was an undue investigative delay, whether any such delay was intentional, what the length of any intentional delay was, or who was responsible (R. 12-13).

Finally, the Service argued (R. 12-13) that respondent's estoppel claim was factually unsupported in any event. The Service asserted that, although the matter was not relevant to review of the order of deportation, the Service was "more than prepared to establish both that the investigative delay was excusable and that the respondent was not residing in a bona fide marital union with [Milligan] during the entire eighteen month period over which the respondent alleges he was eligible for adjustment of status" (R. 13).[4]

Based on the record established at the deportation hearing, the Board affirmed the immigration judge's denial of respondent's adjustment application because of "his statutory ineligibility for such relief" (App. C, *infra*, 7a). Moreover, notwithstanding the jurisdictional and procedural infirmities of respondent's estoppel claim, the Board rejected that claim on the merits (*ibid.*):

> [U]nder the facts of this case (where the denial of the visa petition resulted from its withdrawal by the respondent's wife followed by her filing a petition for divorce in a California Superior Court) we do not find a basis for any "equitable" estoppel even assuming Board jurisdiction to grant such relief. Moreover, we find no evidence of any "affirmative misconduct" by

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[4] In his reply brief, respondent failed to answer any of the legal arguments advanced by the Service, but asked that the Board "not consider [the Service's] *out of record* statements" (R. 9; emphasis in original) with respect to the sham character of his marriage to Milligan.

a Service officer regarding the denial of the visa petition.

5. Respondent appealed the Board's decision to the court of appeals. Although the administrative record was silent with respect to the Service's investigation during the 18-month period preceding Milligan's withdrawal of the visa petition and the District Director's denial of respondent's adjustment application, and although the court of appeals recognized that "[t]he Board found no evidence of any 'affirmative misconduct' by a Service officer regarding the denial of the visa petition" (App. A, *infra*, 2a), the court reversed the Board's decision (*id.* at 1a-2a). The court of appeals held that "[t]he unexplained failure of the INS to act on the visa petition for an eighteen-month period prior to the petition's withdrawal following the breakup of Miranda's marriage was affirmative misconduct by the INS" (*id.* at 2a). The court remanded the case "for consideration of Miranda's application for permanent residence under the circumstances as they existed *at the time the INS should originally have acted*" (*ibid.*; emphasis added), with the additional requirement that "[t]he INS must, * * * in considering the [adjustment] application, treat the visa petition as if it were approved" (*ibid.*).

REASONS FOR GRANTING THE PETITION

Respondent has remained unlawfully in the United States for nearly a decade since the expiration of his nonimmigrant visitor's visa. By his own admission, he has worked throughout this period without authorization, and he has pleaded guilty to the commission of a felony. Nonetheless, the court of appeals has held that the Immigration and Naturalization Serv-

ice is estopped from denying respondent immediate relative status, and must consider his application for permanent resident status, even though he is statutorily ineligible for either benefit. The sole basis for the court's ruling is the "unexplained failure of the INS to act on the visa petition during the 18-month period between its filing and withdrawal." The holding that this delay constitutes "affirmative misconduct by the INS" warranting an estoppel against the government is without any legal basis and conflicts with decisions of this Court. See *Schweiker* v. *Hansen*, No. 80-1162 (Apr. 6, 1981).

Indeed, the decision below creates a novel principle of administrative law by applying a presumption of "affirmative government misconduct" whenever, in a court's view, the time spent in rendering a decision is "unreasonable" and the government has failed to account for the delay to the court's satisfaction. This approach is clearly inconsistent with the proper role of the courts in reviewing administrative action. As this Court recently noted in a related context, "[i]n taking this course, the Court of Appeals extended its 'writ beyond its proper scope * * *.'" *INS* v. *Wang*, No. 80-485 (Mar. 2, 1981), slip op. 6.

1. Since the earliest days of the Nation, this Court has repeatedly and consistently held that the government may not be equitably estopped from enforcing the laws even though private parties may, as a result, suffer hardship in particular cases. See, *e.g.*, *Lee* v. *Munroe & Thornton*, 11 U.S. (7 Cranch) 366, 369-370 (1813); *Hart* v. *United States*, 95 U.S. 316, 318-319 (1877); *Pine River Logging Co.* v. *United States*, 186 U.S. 279, 291 (1902); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 408-409 (1917); *Sutton* v. *United States*, 256 U.S. 575, 579 (1921); *Utah* v. *United States*, 284 U.S. 534, 545-546

(1932); *Wilber National Bank* v. *United States*, 294 U.S. 120, 123-124 (1935); *United States* v. *Stewart*, 311 U.S. 60, 70 (1940); *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384 (1947); *Automobile Club* v. *Commissioner*, 353 U.S. 180, 183 (1957); *Montana* v. *Kennedy*, 366 U.S. 308, 314-315 (1961); *INS* v. *Hibi*, 414 U.S. 5, 8 (1973). Indeed, we are aware of no decision of this Court holding that an estoppel would or should lie against the government in any circumstance.

The Court most recently applied this principle in *Schweiker* v. *Hansen*, No. 80-1162 (Apr. 6, 1981). The question in that case was whether the Secretary of Health and Human Services was estopped from denying retroactive social security benefits to a person who would have been eligible for such benefits but for her failure to file a written application as required by statute. The applicant's failure resulted from her reliance on the erroneous advice of a government official, who also neglected to comply with the procedures recommended by the agency's Claims Manual. The court of appeals held that the "misinformation provided by a Government official combined with a showing of misconduct (even if it does not rise to the level of a violation of a legally binding rule) should be sufficient to require estoppel." *Hansen* v. *Harris*, 619 F.2d 942, 948 (2d Cir. 1980). This Court reversed, noting (*Schweiker* v. *Hansen*, *supra*, slip op. 3) that it "has never decided what type of conduct by a government employee will estop the government from insisting upon compliance with valid regulations * * *." The Court also noted (*ibid.*) that, "[i]n two cases involving denial of citizenship, the Court has declined to decide whether even 'affirmative misconduct' would estop the government from denying citizenship, for in neither case was 'affirmative misconduct' involved. *INS* v. *Hibi*, 414

U.S., at 8-9; *Montana* v. *Kennedy*, 366 U.S., at 314-315."

The question whether, as a general matter, an estoppel will lie against the government in the extreme case of "affirmative misconduct" is likewise not presented here because respondent has made no such factual showing. The mere passage of 18 months prior to the making of an administrative decision hardly demonstrates misconduct of any kind, much less "affirmative" misconduct, and, in the absence of evidence to the contrary, it is to be assumed that such a delay is the result of the agency's obligation to investigate fully the matter presented to it for decision. Indeed, in basing an estoppel merely on a presumption of "affirmative misconduct" arising from an unexplained delay, the court of appeals ignored a second fundamental and long-standing principle of administrative law. As the Court stated in *United States* v. *Chemical Foundation*, 272 U.S. 1, 14-15 (1926): "The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." [5]

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[5] An estoppel based on a presumption of administrative misconduct is particularly inappropriate in the immigration area, given this Court's recognition that " 'over no conceivable subject is the legislative power of Congress more complete * * *.' " *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977), quoting *Oceanic Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909). If Congress had wished to limit the amount of time that the Service may take in investigating a visa petition, or mandate the granting of immediate relative status if the investigation were continued beyond that time, Congress clearly could have done so. Congress has not done so, however, and it is beyond the province of the judiciary to impose such limitations or penalties. See *Steadman* v. *SEC*, No. 79-1266 (Feb. 25, 1981), slip op. 13; *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978).

See also *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 415 (1971).

The estoppel imposed by the court below is unwarranted for two further reasons. First, Congress provided for the granting of immediate relative status to alien relatives of American citizens, not for the benefit of aliens, but for the benefit of citizens. Thus, when Milligan voluntarily withdrew her visa petition, and a visa was therefore no longer "immediately available" to respondent, the explicit congressional policy articulated in Section 245(a) of the Act, 8 U.S.C. 1255(a), and the administrative policy of 8 C.F.R. 245.2 (a)(2), each mandated denial of respondent's application for adjustment of status. The finding of an estoppel was inappropriate because respondent was not deprived of any benefit that Congress had conferred on him, as opposed to Milligan. Second, to give rise to an estoppel, government conduct must at least have caused the complaining party to take or fail to take some action that he cannot now correct. See *Schweiker* v. *Hansen*, *supra*, slip op. 4. Respondent has failed to show any such harm here. Indeed, the duration of the government's investigation clearly benefited respondent by further extending his unlawful stay.[6] Moreover, even if the Service had

[6] In fact, the delay has resulted in the removal of one bar to respondent's eligibility for discretionary relief under Section 244(a) of the Act, 8 U.S.C. 1254(a), because he has now been "physically present in the United States for a continuous period of * * * seven years." In addition, as respondent noted in his brief in the court of appeals (Br. 11), he has also utilized the further delay occasioned by his appeal from the Board's decision to remarry his first wife, who is now a permanent resident alien (as a consequence of an intervening marriage) and who has filed a new visa petition on respondent's behalf under 8 U.S.C. 1153(a)(2).

granted the visa petition prior to its withdrawal by Milligan, that action would not ultimately have benefited respondent because the approval would have been revoked automatically (see 8 C.F.R. 205.1 (a)(4)) once his divorce had come to light.[7]

Finally, as this Court has remarked, the government cannot be put " 'at risk that every alleged failure by an agent to follow instructions to the last detail in one of a thousand cases will deprive it of the benefit of the [practical requirements] which experience has taught to be essential to the honest and effective administration of the [law].' " *Schweiker* v. *Hansen*, *supra*, slip op. 5, quoting *Hansen* v. *Harris*, 619 F.2d 942, 956-957 (2d Cir. 1980) (Friendly, J., dissenting) (footnote omitted). The Court's reasoning applies with even greater force here, where the estoppel found by the court of appeals was premised not on an official's failure to follow instructions, but merely on the "unexplained" length of time that the government took to complete an investigation. Given the great potential for abuse in the area of immediate relative visa petitions filed by citizen spouses, there can be no doubt, as the Ninth Circuit has previously recognized, that careful investigations are essential. See *Pena-Urrutia* v. *INS*, 640 F.2d 242, 244 (9th Cir. 1981). See also 8 U.S.C. 1251(c); *INS* v. *Errico*, 385 U.S. 214 (1966) (sham marriage); *Lutwak* v. *United States*, 344 U.S. 604 (1953) (convictions relating to operation of sham marriage business); *United States* v. *Bithoney*, 631 F.2d 1, 4-5 (1st Cir. 1980), cert.

[7] Even when an alien has actually received an adjustment of status, the adjustment may be rescinded within five years if "the person was not in fact eligible for such adjustment" (8 U.S.C. 1256(a)) because, for instance, he was a party to a sham marriage. See also 8 C.F.R. Part 246.

denied, No. 80-825 (Jan. 12, 1981) (same); *Skelly* v. *INS*, 630 F.2d 1375, 1382 (10th Cir. 1980) (sham marriage). By requiring that immediate relative status be granted to an alien who is statutorily ineligible for that status, because of the Service's delay in acting on a visa petition, the decision below will result in incomplete scrutiny of many such petitions.[8]

2. In *INS* v. *Wang*, No. 80-485 (Mar. 2, 1981), the Court held that the Ninth Circuit had "extended its 'writ beyond its proper scope'" (slip op. 6) by "improvidently encroach[ing] on the authority which the [Immigration and Nationality] Act confers on the Attorney General and his delegates" (*id.* at 5). The

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[8] A staggering number of "immediate relative" visa petitions are filed each year. In 1976, for instance, the year in which Milligan filed her petition on behalf of respondent, some 206,319 such petitions were filed. *1976 Annual Report: Immigration and Naturalization Service* 11. In 1975, the number of petitions filed was 224,012 (*ibid.*). "Credit for this reduction is given to the increased efforts in fraud detection" (*ibid.*). Significantly, the Service noted (*ibid.*):

> In dealing with these petitions, an inordinate amount of fraud, particularly in relation to claimed marriages, has been uncovered. Whole armies of "marriage arrangers" prey upon these aliens desperately seeking admission to this country. For a fee, partners are provided and marriages contracted to establish eligibility under the statutes for visa issuance benefits. A considerable portion of the Service's resources is expended to search out and expose the perpetrators and participants in such sham marriages.

The haste that the court's ruling will occasion would be particularly damaging in the investigation of "immediate relative" petitions filed on behalf of spouses of American citizens. Not only are such petitions subject to substantial abuse, but the validity of a marriage often involves difficult factual and legal determinations. See 1 C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 2.18a (1981).

same "improvident encroach[ment]" exists here. The court below ignored respondent's failure to raise his claim in the proper forum at the proper time, as well as his failure to make any factual record in the immigration court concerning the allegedly improper investigatory delay. As in *Wang*, the court of appeals' failure to require that respondent's claim be properly raised and factually supported in the record would allow "many aliens [to] obtain a hearing based upon quite minimal showings" (slip op. 6).

Moreover, the court of appeals disregarded the narrow scope of judicial review set forth in the Immigration and Nationality Act. In Section 106 (a)(4) of the Act, 8 U.S.C. 1105a(a)(4), Congress specifically provided that the jurisdiction of the courts of appeals in deportation cases should be confined to a review "solely upon the administrative record * * * and the * * * findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive." Although noting that the Board "found no evidence of any 'affirmative misconduct' by a Service officer regarding the denial of the visa petition" (App. A, *infra*, 2a), the court below nonetheless rejected the Board's finding, without any discussion of the question, by simply asserting that the "unexplained" 18-month investigative period constituted affirmative misconduct giving rise to an estoppel.[9] The court ordered (*ibid.*; emphasis added) that the case "be remanded for consideration of [respondent's]

[9] The Service's conduct during the 18-month period was "unexplained" to the court of appeals only because it was irrelevant to respondent's deportation proceedings. As noted above (see page 8, *supra*), however, the Service informed the Board that it was prepared to explain the length of the investigation. At the least, the court of appeals should have remanded to the Board for this purpose.

application for permanent residence under the circumstances as they existed *at the time the INS should originally have acted.* The INS must, however, * * * treat the visa petition as if it were approved." Inasmuch as respondent never attempted to show that any part of the time spent by the Service in completing its investigation was unjustified, the court of appeals had no basis for determining at what time, even in its subjective view, "the INS should have acted." Despite this defect, the court found affirmative misconduct warranting the imposition of an estoppel and required that the Service engage in the wholly unauthorized fiction of "treat[ing] the visa petition as if it were approved" (*ibid.*).

The effect of the court's order is not totally clear. Section 245(a) of the Act understandably makes no provision for accommodating the legal fiction that the court has imposed upon the Service, and it is uncertain whether the Service is now free to consider the evidence that it has developed (but that was legally irrelevant prior to the decision below), showing that respondent's marriage was a sham from the outset. Likewise, it is uncertain whether, in "treat[ing] the visa petition as if it were approved," the Service is precluded from revoking the visa under 8 C.F.R. 205.1(a)(4). If the court's opinion means that the Service is forever estopped from questioning the bona fides of respondent's former marriage, and if the Service is now required to grant respondent an irrevocable special status as the beneficiary of a fictitious immediate relative visa petition, it is all the more clear that the Ninth Circuit has "improvidently encroached on the authority which the Act confers on the Attorney General and his delegates." *INS* v. *Wang, supra,* slip op. 5.

3. The estoppel issue presented by this case is important. In 1976, the year in which Milligan's visa petition was filed, the Service received more than 206,000 "immediate relative" petitions, all of which required investigation. See page 15, note 8, *supra*. Given the size of this caseload and the difficulty of the issues presented for administrative determination, delays are inevitable. The haste imposed upon the Service by the holding below will certainly impede the effectiveness of the Service's efforts to ferret out fraud and to enforce the immigration laws fairly with respect to all persons seeking entry to this country. See *INS* v. *Wang*, *supra*, slip op. 7. The adverse effect of this holding is particularly significant, of course, in light of the large share of immigration cases that are adjudicated in the Ninth Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal. In the alternative, the petition should be granted and the judgment of the court of appeals should be vacated and the case remanded for reconsideration in light of *Schweiker* v. *Hansen*, No. 80-1162 (Apr. 6, 1981).

Respectfully submitted.

LAWRENCE G. WALLACE
Acting Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

KENNETH S. GELLER
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VICTOR D. STONE
Attorney

JULY 1981

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79-7370

HORACIO RAMOS MIRANDA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

Petition for Review from Order of the Board of Immigration Appeals

Argued and Submitted June 5, 1980

[Filed Oct. 30, 1980]

OPINION

Before: PREGERSON and NELSON, Circuit Judges, and WILKINS,* District Judge.

PHILIP C. WILKINS, District Judge

Miranda seeks judicial review of a Board of Immigration Appeals (BIA) decision. Said decision dismissed the appeal of the order of deportation and of the denial of petitioner's application for adjustment of status or for voluntary departure. Petitioner argues that the Immigration and Naturalization Service (INS) should be estopped from denying him the status of permanent resident pursuant to the pro-

* Honorable Philip C. Wilkins, Chief United States District Judge for the Eastern District of California, sitting by designation.

visions of Section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255, due to its delay in processing an immediate relative visa petition filed by his then wife on his behalf. The Board found no evidence of any "affirmative misconduct" by a Service officer regarding the denial of the visa petition. We reverse.

The unexplained failure of the INS to act on the visa petition for an eighteen-month period prior to the petition's withdrawal following the breakup of Miranda's marriage was affirmative misconduct by the INS. *See Villena* v. *INS*, No. 78-2954, slip opinion 3605, —— F.2d —— (9th Cir. 1980) (en banc); *Sun Il Yoo* v. *INS*, 534 F.2d 1325 (9th Cir. 1976).

The matter will be remanded for consideration of Miranda's application for permanent residence under the circumstances as they existed at the time the INS should originally have acted. The INS must, however, in considering the application, treat the visa petition as if it were approved.

Reversed and remanded.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79-7370

HORACIO RAMOS MIRANDA, PETITIONER

vs.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

[Filed Mar. 24, 1981]

ORDER

Before: PREGERSON and NELSON, Circuit Judges, and WILKINS,* District Judge

The panel has voted to deny the petition for rehearing. Judges Pregerson and Nelson have voted to reject the suggestion for rehearing en banc, and Judge Wilkins recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

---

* The Honorable Philip C. Wilkins, Chief United States District Judge for the Eastern District of California, sitting by designation.

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
Washington, D.C. 20530

Jul. 17, 1979

File: A22 380 487—Los Angeles

In re: HORACIO RAMOS MIRANDA

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Jack T. Price, Esq.
448 South Hill Street
Suite 718
Los Angeles, Calif. 90013

CHARGE:

Order: Section 241(a)(2), I&N Act (8 U.S.C. 1251(a)(2))—Nonimmigrant remained longer than permitted

APPLICATION: Adjustment of status, voluntary departure

The respondent appeals from an April 6, 1978, decision of an immigration judge finding him deportable as charged, denying his applications for adjustment of status and voluntary departure, and ordering his deportation to the Philippines. The appeal will be dismissed.

The respondent is a 47-year-old native and citizen of the Philippines, who entered the United States as a visitor for pleasure in July 1971. He married

a United States citizen in May 1976 and she filed a visa petition on his behalf in June 1976. In December 1977, however, the respondent's wife informed the Service that she was withdrawing the visa petition.[1] That same month, the District Director denied the respondent's application for status as a permanent resident based on a finding that he had failed to establish that an immigration visa was immediately available.

An Order to Show Cause had been issued on December 7, 1977, charging the respondent with being deportable under section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2), as an "overstayed" visitor. At hearings held in March 1978, the respondent conceded deportability, but applied for adjustment of status under section 245 of the Act, 8 U.S.C. 1255. Alternatively, he requested voluntary departure under the provisions of section 244(e), 8 U.S.C. 1254(e).

The immigration judge denied the application for adjustment of status based on respondent's failure to establish eligibility for an immigrant visa. See Section 245(a)(2) and (3). As regards the application for voluntary departure, the respondent admitted that he had been convicted in a California state court in 1976 for a misdemeanor offense involving the possession of a "blue box" (a devise used to defraud the telephone company of its services). It was subsequently determined that the respondent had been convicted on his plea of guilty in June 1977, placed on "summary" probation for a period of one year, and ordered to make restitution to the telephone company in the amount of some $3,500. On March 31,

[1] The respondent's wife filed a petition for divorce in a California Superior Court on December 20, 1977.

1978, the State court terminated probation and vacated the conviction under the provisions of section 1203.4 of the California Penal Code following proof that restitution had been made.

The immigration judge determined that the expungement of the respondent's record of conviction under section 1203.4 of the California Penal Code removed any bar to his establishing good moral character under the provisions of section 101(f) of the Act, 8 U.S.C. 1101(f). *See Matter of Ibarra-Obando*, 12 I&N Dec. 576 (BIA 1966; A.G. 1967) (effect of expungement of non-drug offense under section 1203.4 of the California Penal Code); *Matter of G-*, 9 I&N Dec. 159 (BIA 1959; A.G. 1960); *Matter of H*, 6 I&N Dec. 619 (BIA 1955). *But see, Ocon-Perez* v. *INS*, 550 F.2d 1153 (9 Cir. 1977); *Burr* v. *INS*, 350 F.2d 87 (9 Cir. 1965), *cert. denied* 383 U.S. 915 (1966). The immigration judge concluded, however, that the conduct underlying the vacated conviction could be considered in determining whether favorable discretionary consideration of the application for voluntary departure was warranted. *See Matter of Gonzalez*, Interim Decision 2564 (BIA 1977); *Matter of H-, supra.* In view of the recency of the respondent's conviction and his absence of familial ties to the United States, the immigration judge concluded that voluntary departure should be denied in the exercise of discretion.

On appeal, the respondent, through counsel, submits that the Service should be "equitably" estopped from denying the adjustment of status application because the Service had sufficient time during the 18 months between the filing of the visa petition and its withdrawal by the respondent's wife to have acted on both the petition and the application for permanent resi-

dence. However, under the facts of this case (where the denial of the visa petition resulted from its withdrawal by the respondent's wife followed by her filing a petition for divorce in a California Superior Court) we do not find a basis for any "equitable" estoppel even assuming Board jurisdiction to grant such relief. Moreover, we find no evidence of any "affirmative misconduct" by a Service officer regarding the denial of the visa petition. See *INS* v. *Hibi*, 414 U.S. 5 (1973); *Santiago* v. *INS*, 526 F.2d 488 (9 Cir. 1975), *cert. denied* 425 U.S. 971 (1976). *But see Sun Il Yoo* v. *INS*, 534 F.2d 1325 (9 Cir. 1976). Accordingly, we find the respondent's application for adjustment of status under section 245 was properly denied based on his statutory ineligibility for such relief.

As regards the denial of voluntary departure, we find that the immigration judge properly concluded that the respondent was not statutorily precluded from establishing his good moral character under the provisions of section 101(f) of the Act by virtue of his conviction for possession of a "blue box." Wholly aside from the fact that the non-drug offense was expunged under section 1203.4 of the California Penal Code (*See Matter of Ibarra-Obando, supra*), that single conviction qualified as a petty offense within the meaning of section 212(a)(9) of the Act and, thus, was not within scope of section 101(f). *See Matter of Urpi-Sancho*, 13 I&N Dec. 641 (BIA 1970). The misconduct underlying that conviction, however, was properly considered by the immigration judge in determining whether the respondent was deserving of a discretionary grant of voluntary departure. *See Matter of Turcott*, 12 I&N Dec. 206 (BIA 1967).

In view of the recency and extent of this misconduct (as evidenced by the amount of restitution required),

we consider it to be an adverse factor relevant to the exercise of discretion even in view of the respondent's restitution of some $3,500 to the telephone company and the subsequent expungement of the conviction. We find no countervailing equitable considerations alleged by respondent sufficient to warrant a favorable exercise of discretion. In fact, other than contesting the weight to be attached to the misconduct surrounding the "blue box" offense, no countervailing equities are alleged by the respondent. Therefore, we find no error with the immigration judge's determination that voluntary departure was appropriately denied in the exercise of discretion.

The appeal will accordingly be dismissed.

ORDER: The appeal is dismissed.

/s/ David L. Milhollan
Chairman

APPENDIX D

UNITED STATES IMMIGRATION COURT
UNITED STATES DEPARTMENT OF JUSTICE
Los Angeles, California

File No. A22 380 487 April 6, 1978

IN THE MATTER OF
HORACIO RAMOS MIRANDA, RESPONDENT

IN DEPORTATION PROCEEDINGS

CHARGE: I & N Act, Section 241(a)(2); nonimmigrant remained longer than permitted

APPLICATION: Adjustment of status under Section 245; in the alternative, voluntary departure in lieu of deportation

ON BEHALF OF RESPONDENT:

Jack T. Price, Esq.
448 South Hill Street
Suite 718
Los Angeles, California

ON BEHALF OF SERVICE:

William Odencrantz, Esq.
Trial Attorney
Los Angeles,
California

DECISION OF THE IMMIGRATION JUDGE

In pleading to the Order to Show Cause, the respondent admitted that he entered the United States as a visitor for pleasure on July 23, 1971, and that he has

remained in this country without authority since December 1, 1971. He conceded and I am satisfied that he is deportable on the charge set out in the Order to Show Cause.

Respondent has filed an application for adjustment of status under Section 245 claiming that he is eligible for such relief on the basis of his marriage to a United States citizen, Linda Milligan. A visa petition, although filed by Linda Milligan, was withdrawn by her on December 5, 1977, prior to adjudication by the District Director, *Exhibit No. 2.* As the respondent is not the beneficiary of a valid unexpired visa petition, he is not eligible for the benefits of Section 245, 8 C.F.R. 245.1(d). His application is denied.

Respondent has applied for the privilege of voluntary departure. The respondent was convicted upon his plea of guilty in the Municipal Court, North Orange County, California, on June 23, 1977 for violation of Section 502.7(b)(1) of the California Penal Code. The offense is commonly called, "Blue Box" crime. It penalizes those who obtain telephone or telegraph services "with intent to defraud." The crime involves moral turpitude since a necessary element to convict is the intent to defraud. *Matter of Kinney,* 10 I & N Dec. 548.

Upon making full restitution of $3,547.72 to the telephone company, the respondent was permitted to withdraw his plea of guilty and the crime was expunged under Section 1203.4 of the California Penal Code.

The expungement of the record of conviction under California law removes the bar to establishing good moral character. *Matter of H.,* 7 I & N Dec. 249. The conviction and the nature of the criminal activity

which resulted in that conviction will be considered in determining whether the application for voluntary departure merits favorable consideration. *Matter of H.*, 6 I & N Dec. 619, *Matter of Gonzalez*, Int. Dec. 2564.

Although the respondent may be eligible for the discretionary relief of voluntary departure, this does not mean that he must be granted that relief. Discretion must be based upon the balancing of factors, both favorable and unfavorable. There is no indication that the respondent has close family ties in the United States. His marriage to a United States citizen is at an end. The recency of his conviction for a crime involving moral turpitude is a sufficient adverse factor without counterbalancing favorable factors for me to deny his application as a matter of administrative discretion.

ORDER:

IT IS ORDERED that the respondent's application for adjustment of status under Section 245 of the Act be and the same is hereby denied.

IT IS FURTHER ORDERED that the respondent's application for voluntary departure be denied.

IT IS FURTHER ORDERED that the respondent be deported from the United States to the Philippines on the charge set forth in the Order to Show Cause.

/s/ Jay Segal
JAY SEGAL
Immigration Judge

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Office-Supreme Court, U.S.
FILED
AUG 21 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-82

IN THE

Supreme Court of the United States

October Term, 1980.

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

vs.

HORACIO RAMOS MIRANDA,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI.

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Attorney for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Question Presented.

Whether the unreasonable and unexplained failure by the Immigration and Naturalization Service to adjudicate a visa petition, properly filed in behalf of an alien, thereby causing the alien to become statutorily ineligible for the status petitioned for, constitutes affirmative misconduct for which the Immigration and Naturalization Service may be estopped from denying the alien permanent resident status based on the classification to which he was originally entitled.

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No. 81-821
IN THE

Supreme Court of the United States

October Term, 1980.

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

vs.

HORACIO RAMOS MIRANDA,
Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI.

Jurisdiction.

Respondent agrees with petitioner's statement of jurisdiction.

Statutes and Regulations Involved.

Respondent agrees with petitioner's statement of Statutes and Regulations involved as set forth and adds thereto:

8 C.F.R. 245.2(a)(4) provides in pertinent part:

> The applicant shall be notified of the decision and, if the application is denied, of the reasons therefor. Except as otherwise provided in this subparagraph, no appeal shall lie from the denial of an application by the district director but such denial shall be without prejudice to the alien's right to renew his application in proceedings under Part 242 of this chapter, * * * *.

Statement.

1. Respondent Horacio Ramos Miranda, a 49-year old native and citizen of the Philippines, entered the United States on July 23, 1971, as a visitor for pleasure with authority to remain until December 1, 1971 (R. 58).[1] On May 26, 1976, Respondent married Linda Milligan, a United States citizen (R. 73). Linda Milligan signed a visa petition on behalf of respondent, her husband, and requested that he be classified as the Immediate Relative of a United States citizen for issuance of an immigrant visa (R. 76, 76-A). See 8 U.S.C. 1151(a) and (b). The visa petition which (if approved) would qualify respondent as a person to whom "an immigrant visa is immediately available * * *" (8 U.S.C. 1255(a)(3)), together with respondent's application for adjustment of status to that of permanent resident alien, were filed with the Immigration and Naturalization Service on June 10, 1976 (R. 66, 66-B, 76).

2. On December 5, 1977, approximately eighteen months later, and before the Service had adjudicated the visa petition, respondent's wife, Linda Milligan, withdrew it (R. 75). On the same day, December 5, 1977, and NOT December 14, 1977[2] the Service denied respondent's application for adjustment of status to that of permanent res-

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[1] "R" refers to the certified administration record in the Court of Appeals, a copy of which has been lodged with the Clerk of the Court.

[2] The certified administrative record at R-77 does not reflect the true date that the decision on respondent's application for status as permanent resident was rendered by the District Director. The decision was actually rendered December 5, 1977; however, the original date was obliterated and replaced at the upper and lower right side of the document with a handwritten date of December 14, 1977. This is the date (December 14, 1977) respondent was arrested and taken into custody by the Service and the date he was first served notice of the decision. A full statement of this discrepancy appears in respondent's "Petitioner's Reply Brief" to the United States Court of Appeals for the Ninth Circuit at pages 2, 3. This discrepancy has yet to be explained or rebutted by the Service. (See Appendix attached hereto.)

ident, on the basis that an immigrant visa was not "immediately available" to him (R. 77, 78).

3. Within 48 hours, on December 7, 1977, the Service issued a warrant for the arrest of the respondent, issued an order to show cause why respondent should not be deported as an "overstayed" visitor, and scheduled a deportation hearing to commence on December 22, 1977 (R. 79, 79-A). See U.S.C. 1251(a)(2). On December 14, 1977, Mr. Miranda was arrested by a Service officer at his home, taken into custody and released under bond in the amount of $3,000.00 (R. 79, 79-A). It was at this time Mr. Miranda was first informed that the visa petition had been withdrawn and that his application for adjustment of status to permanent resident had been denied by the District Director (R. 77, 78, 79, 79-A).

4. At deportation hearings conducted in March 1978 (R. 20-38), respondent admitted he was an "overstayed" visitor, and on that basis alone he would be deportable; however, during the course of the hearings he renewed his application for permanent resident status pursuant to 8 CFR 245.2(a)(4), based on his marriage to Milligan (R. 27-29). Counsel for the respondent attempted to submit evidence relating to the bona fides of respondent's marriage, including the date of the break up of the marriage, and the date respondent was first advised of the denial of his application for permanent resident status (R. 29-31). The Service objected to the introduction of such evidence as being irrelevant (R. 30).

The immigration judge sustained the Service's objection, ruling that such evidence was irrelevant and precluded counsel from pursuing the introduction of evidence on these issues (R. 31). The Service offered neither argument nor

evidence that respondent's marriage to Milligan was sham or fraudulent in any manner.

Respondent requested, in the alternative to deportation, that he be granted voluntary departure (R. 27, 32-38). In his application for voluntary departure, respondent volunteered that he had, in the Municipal Court of the State of California, North Orange County Judicial District, entered a plea of guilty to the violation of Section 502.7(b)(1) of the California Penal Code (R. 62-64). Respondent was thereupon convicted of a misdemeanor which would be classifiable as a petty offense. Respondent made full restitution to the Pacific Telephone Company; completed his period of summary probation; and pursuant to California Penal Code Section 1203.4, withdrew his guilty plea, and the conviction was dismissed on March 31, 1978 (R. 65).

5. The immigration judge denied Respondent's application for adjustment of status to permanent resident since he was not the beneficiary of a visa petition approved by the District Director (R. 58). The immigration judge also denied respondent's request for voluntary departure "as a matter of administrative discretion" (R. 60).

6. On appeal to the Board of Immigration Appeals, Respondent once again pursued his argument as to the bona fides of his marriage (R. 43), and the oppressive and unjustifiable delay of the Service in failing to adjudicate the visa petition and application for permanent resident status (R. 42-45). The respondent had been foreclosed from presenting these arguments in the deportation hearing, but there was no such foreclosure in this forum and Respondent's arguments were permitted to be advanced (R. 29-31).

The Service improperly argued that respondent had raised his estoppel claim in an improper forum asserting respondent was challenging a denial of the visa petition (R. 11).

Respondent was in the proper forum because the visa petition had never been denied. It was never acted upon by the District Director until eighteen months after filing, when it was withdrawn by Milligan (R. 75). Respondent raised the issue that the Service should be estopped from denying his application for adjustment of status to that of a permanent resident (R. 42-45).

The Service, for the first time, asserted the eighteen month delay in acting upon the pending visa petition was an excusable "investigative delay" and accused respondent of not having resided in a "bona fide marital union" for the full eighteen month period (R. 13). However, the Service did not offer one scintilla of evidence in support of its assertions, or even to show that an investigation had in fact ever been conducted; that there was fraud in the inception of respondent's marriage; that respondent's marriage was a sham; or that respondent did not reside in a "bona fide marital union" with his wife.

In response to these unsupported assertions and unsubstantiated accusations, which had not previously been made a part of the record, the Respondent in his reply brief to the Board of Immigration Appeals requested that the Board not give consideration to the Service's *out of record* statements.

The Board affirmed the decision of the immigration judge (R. 4). Further, the Board addressed the issue of Equitable Estoppel and questioned whether it would have the authority to grant such relief (R. 4). The Board then proceeded to find no evidence of "affirmative misconduct" on the part of the Service as respondent's wife had withdrawn the visa petition.

Additionally, the Board affirmed the immigration judge's decision as to the denial of respondent's application for voluntary departure.

7. Respondent appealed the Board's decision to the Court of Appeals and argued that the Service should be equitably estopped from denying his application for adjustment of status to that of a permanent resident. Respondent asserted the Immigration and Naturalization Service has a duty to adjudicate applications in a timely manner. The Court was informed that the Service's policy at one time had been to schedule a combined hearing to adjudicate a visa petition and an application for adjustment of status within three months of receipt by the Service.

Respondent asserted that the Service had intentionally delayed acting upon the visa petition and respondent's application for adjustment of status in order to test the "bona fides" of respondent's marriage to Linda Milligan. It was not until a drastic change had occurred in respondent's circumstances, some one and one-half years after the filing of the visa petition and application for adjustment of status; to wit, the breakup of respondent's marriage, that the Service acted. Within forty-eight hours the Service (1) denied the application for adjustment of status; (2) issued a warrant for the arrest of respondent; (3) issued an order to show cause why respondent should not be deported; (4) scheduled a deportation hearing; and (5) in seven days had arrested respondent and taken him into custody.

Respondent contended the eighteen month delay was unjustifiable and oppressive. Respondent argued that the Service's intentional failure to act without just cause when the Service was under a duty to act in a timely manner constituted affirmative misconduct and that equitable estoppel should be invoked against the Service. Had the Service complied with its duty to adjudicate applications in a timely manner, Respondent's application would have been acted upon while his marriage was intact and he would have received permanent resident status.

In spite of the Service's assertion to the Board of Immigration Appeals that it could establish that the "investigative delay" (R. 13) was excusable, the Service offered no evidence to the Court that any type of investigation had been conducted or that there was a question as to the "bona fides" of respondent's marriage which would justify the eighteen month delay.

The Court of Appeals held that the Service had engaged in affirmative misconduct and remanded the case for consideration of respondent's application for permanent residence at the time the Service should have acted, with the requirement that the Service, in considering the adjustment application had to treat the visa petition as if it were approved.

8. On December 12, 1980, the Immigration and Naturalization Service petitioned the Court of Appeals for rehearing and suggestion for rehearing *en banc*. On March 14, 1981, the Court of Appeals denied the petition for rehearing and the suggestion for rehearing *en banc* was rejected.

Reasons for Denying the Writ.

The court of appeals has fully considered and correctly decided that the conduct of the Immigration and Naturalization Service's unexplained failure to act for a period of one and one-half years on the visa petition filed in behalf of the respondent and respondent's application for adjustment of status prior to the withdrawal of said visa petition following the breakup of respondent's marriage was affirmative misconduct by the Service, and, as such, operated to estop the government from denying the respondent the benefit of immediate relative status.

There is no conflict between the decision of the court of appeals in this case and the decisions of this Court. The

historical approach was a rigid rule that estoppel would not be permitted against the government regardless how outrageous or shocking the misconduct of the government or the hardship suffered by the individual. Recently there has been a more enlightened balancing approach developing which measures the harm the individual suffers as compared to the damage to the public interest caused by the application of the estoppel doctrine against the government.

This Court has, without specifically labeling the remedy as estoppel, applied the principles of equitable estoppel, by allowing an alien, who was statutorily debarred from becoming a United States citizen, be granted citizenship. The alien, in reliance on misinformation furnished to him by United States government officials, claimed an exemption from liability for military service under section 3(a) of the Selective Training and Service Act of 1940. This Act contained a proviso that one who claimed exemption as a neutral alien should thereafter be barred from becoming a citizen of the United States. Subsequently the court of appeals reversed an order of the district court admitting the alien to citizenship. This Court granted certiorari and reversed the court of appeals stating. "Considering all the circumstances of the case, we think that to bar petitioner, nothing less than in intelligent waiver is required by elementary fairness." *Moser v. United States*, 341 U.S. 41, at 47 (1951). The Court prevented the government from denying the alien U. S. Citizenship even though the government was acting in its sovereign capacity by applying the principles of estoppel. "To do otherwise", the Court indicated, would violate notions of "elementary fairness." *United States v. Wharton*, 514 F.2d 406, at 411 (9th Cir., 1975).

There is no doubt that courts have been reluctant to invoke the remedy of equitable estoppel against government agencies. However, when the circumstances of a particular case

warrant this extraordinary remedy to prevent a serious injustice caused by the government's miscounduct and when the public interest will not be unduly damaged by invoking estoppel this Court has indicated such a remedy may be proper.

> "While the issue of whether 'affirmative misconduct' on the part of the Government might estop it from denying citizenship was left open in *Montana v. Kennedy*, 366 U.S. 308, 314, (1961), no conduct of the sort there adverted to was involved here. We do not think that the failure to fully publicize the rights which Congress accorded under the Act of 1940, or the failure to have stationed in the Philippine Islands during all of the time those rights were available an authorized naturalization representative, can give rise to an estoppel against the Government." *Immigration and Naturalization Service v. Hibi*, 414 U.S. 5, 8-9 (1973).

This Court's decision in *Hibi* set the standard which had to be met before the rule of estoppel could be invoked against the government in immigration cases by suggesting there must be "affirmative misconduct" on the part of the government. The Court found no estoppel in that case as it determined there had been no conduct by the government which would constitute "affirmative misconduct."

The petitioner relies heavily on the recent decision of this Court in *Schweiker v. Hansen*, No. 80-1162 (April 6, 1981) for establishing the principle that an estoppel would never, under any circumstances, lie against the government. The question in that case was whether estoppel could be invoked against the Secretary of Health and Human Services to prevent the denial of retroactive social security benefits to a person who in reliance on erroneous information given to her by a government representative failed to file a written application for said benefits. The lower court conceded, and

this Court found that the government representative's conduct was less than "affirmative misconduct." The Court merely stated in dicta that it has ". . . declined to decide whether even 'affirmative midconduct' would estop the government from denying citizenship, for in neither case was 'affirmative misconduct' involved, *INS v. Hibi*, 414 U.S. at 8-9 . . .; *Montana v. Kennedy*, 366 U.S. at 314-315, ..." Therefore, this case does not establish the principle that estoppel will not lie against the government when there has been a finding of "affirmative misconduct" on the part of the government by a lower court. As such, there is not a direct conflict between the decisions of this Court and the court of appeals in the instant case.

The petitioner asserts there is no question whether, as general matter, estoppel will lie against the government in the case of "affirmative misconduct" since respondent has made no such factual showing. This assertion ignores the fact that the lower court, after a review of facts in the instant case, has determined that the Immigration and Naturalization Service did engage in "affirmative misconduct." This Court has never defined what conduct on the part of the government would constitute "affirmative misconduct." It is likely this Court has not defined "affirmative misconduct" because it wisely recognizes the impossibility of setting forth a rigid definition as to what constitutes "affirmative misconduct." Certainly such a determination must be left to an inquiry into the facts of each case as it arises since such determination must necessarily turn on the actions of the parties involved.

The facts in the instant case are distinguishable from those cited in the *Hibi* case, *supra*. Hibi was an alien who contended the government should be estopped from denying him citizenship because the government had failed to publicize the availability of United States citizenship to a certain

class of persons in the Philippine Islands and because the government had failed to continuously station naturalization examiners in the Philippines during the entire period of time the law allowed the granting of citizenship to that certain class of persons. Hibi did not assert his claim until twenty years after the time period statutorily ended. It can easily be seen that Hibi was not totally dependent on the government's action but could have utilized his own resources to achieve his desired goal. Had he exercised due diligence and acted in a timely manner he could have possibly gained the citizenship status he desired. The Court found that the fact the government elected not to engage in an extensive publicity campaign and did not incur the expense of stationing government representatives in a foreign country was not "affirmative misconduct".

The instant case may also be factually distinguished from *Schweiker v. Hansen*, No. 80-1162 (April 6, 1981). In that case a woman asserted that because a government representative had given her erroneous information and failed to instruct her to file a written claim, as was required by internal agency instructions, the government should have been estopped from denying her twelve months retroactive social security payments. We again see the factual pattern that the woman was not totally dependent upon the government for her information. The erroneous information given to her was given under chaotic circumstances and the failure to instruct her to file a written claim was due only to negligence on the part of the government representative. The woman was not precluded from exercising her own initiative in obtaining the information she needed as to the proper procedures to follow in advancing her claim. It is not even certain the woman had furnished the government representative with sufficient correct information for him to make a proper decision in her case. This Court found that the

innocent error and simple negligence on the part of the government was not conduct which would constitute "affirmative misconduct."

In the instant case a visa petition with the necessary supporting documentation to classify Miranda as an "Immediate Relative" spouse of a United States Citizen was timely filed with the Immigration and Naturalization Service. Miranda, simultaneously properly filed an application for adjustment of status to a permanent resident with the Service. Once he had accomplished these steps Miranda became totally dependent on the actions of the Service. The Service did not act upon either the visa petition or the application for adjustment of status for a period of eighteen months. The failure of the Service to timely adjudicate the applications in a timely manner was a violation of a statutory duty. "The INS has a statutory obligation to issue visas to qualified applicants to the full extent of the annual quota limits established by Congress. The legislative history of the Immigration and Naturalization Act indicates that this duty has not been left to agency discretion, see S. Rep. No. 748, 89th Cong., 1st. Sess. reprinted in [1965] U.S. Code Cong. & Ad. News pp. 3328, 3337-38, but is obligatory upon the agency." *Galvez v. Howerton*, 503 F.Supp. 35 at 38, 39 (1980). Upon the breakup of Miranda's marriage and the withdrawal of the visa petition by his wife eighteen months after receipt of the application the government with amazing speed and efficiency (within less than 48 hours) was able to adjudicate Miranda's application for adjustment of status and write a denial opinion; prepare and issue a warrant of arrest for Miranda; prepare and issue an order to show cause why Miranda should not be deported; and schedule a deportation hearing. Within the next seven days the government had arrested and taken Mr. Miranda into custody. The government has never shown any justification

for the unexplained eighteen month failure to act upon the applications. The government has belatedly asserted the delay was due to the need to conduct an investigation, presumably into the bona fides of Miranda's marriage. However, the government has never established that an investigation was ever conducted. The government has by innuendo attempted to create the impression that Mr. Miranda's marriage was a sham; however, not one piece of evidence has been offered to establish there existed any fraud at the inception of Mr. Miranda's marriage or to cast doubt upon the bona fides of the marriage. Therefore, all such references should be disregarded. The court of appeals held that the unexplained eighteen month failure, based on the government's conduct, was affirmative misconduct. It can be readily seen that Miranda was powerless to take further actions to obtain the permanent resident status to which he was entitled. He had acted in a timely and diligent manner. The eighteen month delay was the proximate cause of Miranda not being granted permanent resident status and his deportability was interdependent upon him being denied the permanent resident status.

It does not help petitioners to observe that the Court has not defined "affirmative misconduct" or that the Court has not *expressly* decided the question whether the government may be estopped when it has engaged in affirmative misconduct to the detriment of an individual. The fact that a given question has not been resolved by the Supreme Court has never been a recognized basis for the grant of certiorari.

Nor does the possibility that this issue might arise in some other case require resolution by the Supreme Court. The lower courts have recognized that to invoke the extraordinary remedy of equitable estoppel against the government there must be a threshold finding that the conduct complained of must constitute "affirmative misconduct". See,

Lee Yoo Fee v. Dulles, 236 F.2d 885 (7th Cir. 1956) rev'd on other grounds, 355 U.S. 61 (1957); *Santiago v. INS*, 526 F.2d 488 (9th Cir. 1975) (en banc) cert. denied, 425 U.S. 971 (1976); *Corniel-Rodriguez v. INS*, 532 F.2d 301 (2d Cir. 1976); *Sun Il Yoo v. INS*, 534 F.2d 1325 (9th Cir. 1976).

The factual inquiry as to whether affirmative misconduct has occurred is best left with the lower courts. These determinations must be made on a case by case basis. It is not sufficiently important to cause the Supreme Court to have to inquire de novo in each case. In the present case, petitioner raises only questions turning entirely on the facts of this case, already resolved in favor of the respondent, and without any impact outside the limits of this case. Certiorari, therefore should be denied.

Conclusion.

Since there is no conflict among the courts of appeals or this Court and the question presented in this case turns solely on the facts of this case there is not reason to grant the writ.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent.

APPENDIX.

Respondent is wrong in stating at page 2 of Respondent's Brief that the Application for Permanent Residence was denied on December 14, 1977, and that said application was denied subsequent to the issuance of the Order to Show Cause which was issued on December 7, 1977 (R. 79). There is an error in the transcript of record as to the date of the denial of petitioner's application for status as a permanent resident (R. 77). The transcript of record reflects the date of decision as being December 14, 1977; however, it should be noted the typewritten date has been obliterated and replaced at the upper and lower right side of the document with the date of "12-14-77" and the initials "M.H.F" (R. 77).

The decision to deny petitioner's application was rendered on December 5, 1977, as was stated in Petitioner's Brief at page 3. (Attached hereto is a copy of the original unaltered Immigration Form I-291, "Decision on Application for Status As Permanent Resident" reflecting the date of decision to the December 5, 1977, which is marked as petitioner's Exhibit "B".) Petitioner was not notified of this decision until December 14, 1979, the date he was arrested and taken into custody by Criminal Investigator Michael H. Flynn, of the Immigration and Naturalization Service as is noted on Order to Show Cause/Warrant of Arrest (R. 79A). Petitioner can only presume that Mr. Michael H. Flynn altered the date on the government's form I-291 to reflect the date it was served on petitioner rather than the date the District Director actually rendered his decision to deny petitioner's application for permanent residence (R. 77).